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No. 86-838

In The Supreme Court of the United States

October Term, 1986

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Petitioner,

vs.

NEW YORK TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF

Petitioner Harold Nordlicht ("Nordlicht") files this brief in reply to the brief of respondent New York Telephone Company ("Nytel") served in opposition to the petition of Nordlicht for the issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the Second Circuit, dated August 25, 1986.

SUMMARY OF ARGUMENT

The decisions of the Second and Ninth Circuit Courts of Appeals with respect to removal jurisdiction are in irreconcilable conflict and should be reviewed by this Court.

ARGUMENT

I

There Is Conflict Between The Second And Ninth Circuits With Respect To Removal Jurisdiction

The proposition that there is no conflict between the Second and Ninth Circuit Courts of Appeals with respect to removal jurisdiction can be maintained only by ignoring the language of the decisions of the two courts.

In *Hunter v. United Van Lines,* 746 F.2d 635 (9th Circ. 1984), *cert. denied,* 54 U.S.L.W. 3227 (1985), the Ninth Circuit, in reversing and remanding to District Court with instructions to remand to State Court, stated that

> "Thus, at least in this Circuit, removal is improper when federal law simply displaces state law without replacing the state cause of action with a federal one. When federal law displaces state law without supplanting it, a plaintiff cannot be deemed to be attempting to avoid a federal cause of action; there is no federal cause of action to avoid. In such a case federal preemption operates only as defense.

Hunter, 746 F.2d at 643.

The Second Circuit, however, held that "[b]ecause federal law preempts state law in the area of interstate telecommunications and Nordlicht's claims must necessarily arise under federal common law, the motion to remand was properly denied" (7a).

The contradiction between the two Circuits cannot be harmonized on the basis that the Communications Act has replaced Nordlicht's state law claims for fraud and money

had and received with federal claims because the savings clause of the Act (47 U.S.C. §414) specifically preserves pre-existing State Common Law remedies.

Nordlicht's claims do not challenge the "duties, charges and liabilities" of Nytel (6(a)). Implicit and wrong is Nytel's argument that Canadian and American currencies are interchangeable. Indeed, the substitution of one for the other without a corresponding allowance for the value differential is the gravamen of Nordlicht's state law claims. Since these state law claims have not been replaced by federal ones "[f]ederal jurisdiction is lacking whether or not the state claims are preempted." *Hunter,* 746 F.2d at 644.

CONCLUSION

For all of the foregoing reasons, this petitioner submits that a writ of certiorari should issue to review the judgment and the opinion of the Second Circuit.

Dated: New York, New York
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